BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SAMMAMISH PLATEAU WATER AND SEWER DISTRICT, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and PORT BLAKELY COMMUNITIES, Respondents.	PCHB NO. 05-145 ORDER GRANTING AND DENYING PARTIAL SUMMARY JUDGMENT

Appellant Sammamish Plateau Water and Sewer District (District) challenges National Pollutant Discharge Elimination System (NPDES) and Waste Discharge Permit No. WA-0031188-7 (Permit) issued by the Washington State Department of Ecology (Ecology) to Port Blakely Communities (Port Blakely) for the discharge of stormwater connected with construction activities on approximately 180 acres of the Issaquah Highlands development. The appellant District, respondent Port Blakely, and respondent Ecology, filed cross motions for summary judgment and partial summary judgment.[1] In considering the motions, the Board, comprised of William H. Lynch, chair, Kathleen D. Mix, and Andrea McNamara Doyle, reviewed the following material:

1. Sammamish Plateau Water and Sewer District's Motion for Summary Judgment and Request for Stay.

[1] Sammamish Plateau Water and Sewer District sought a stay of the Permit at the outset of this case. The request for stay was withdrawn and is not addressed in this opinion.

2. Declaration of James Carr with Figures 1-3.

3. Declaration of Ron Little with Exhibit.

4. Declaration of John C. Ruple with Exhibits 1-20.

5. Port Blakely Communities' Motion for Partial Summary Judgment.

6. Declaration of Jim Berger with Exhibits A-F. (corrected)

7. Declaration of Ame Wellman with Exhibits A-D.

8. Ecology's Motion for Partial Summary Judgment.

9. Declaration of John T. Cooke with Exhibits A-B.

10. District's Response in Opposition to Ecology's Motion.

11. Declaration of James Tupper with Exhibit 1.

12. Declaration of Scott Adamek with Attachment.

13. District's Response in Opposition to Port Blakely's Motion.

14. Declaration of Joshua Brower with Exhibits 1-2.

15. Ecology's Response to District's Motion for Summary Judgment.

16. Port Blakely's Response to District's Motion for Summary Judgment.

17. Second Declaration of Jim Berger.

18. Declaration of Bruce Johnson with Exhibit A.

19. Declaration of Keith Niven with Exhibits A-E.

20. Declaration of Brian Beaman with Exhibits A-D.

21. Declaration of John Lenth with Exhibits A-C.

22. Second Declaration of Ame Wellman with Exhibits A-C.

23. District's Reply in Support of Motion for Summary Judgment.

24. Second Declaration of James Tupper with Exhibit 1.

25. Ecology's Reply to District's Response on Ecology's Motion for Summary Judgment.

26. Port Blakely's Reply to District's Response to Motion for Partial Summary Judgment with attached drawings from Ruple Ex.1.

Based upon the evidence submitted and the briefs of counsel, the Board enters the following decision.

Facts

The case in dispute relates to Ecology's re-issuance of an Individual Construction Stormwater NPDES Permit for discharges of construction stormwater from 180 acres of the Issaquah Highlands Community.[2] Issaquah Highlands is a mixed–use, urban planned community that will ultimately include some 640 acres of high-density, single family residential, multifamily, retail, and commercial development, and about 65 acres of low-density, single-family residential development. The urban development is located within the City of Issaquah, north of I-90 and east and south of the Issaquah-Fall City Road, and the rural development is located within unincorporated King County, north of I-90 and east of the urban development. Nearly all of the Issaquah Highlands is located on the Sammamish Plateau overlooking the City of Issaquah and the Puget Sound lowlands to the west. Developed areas of the site are surrounded by about 1,500 acres of forested open space set aside as a condition of development.

[2] Stormwater from property within the Issaquah Highlands Community that has been transferred to other owners is being regulated through other NPDES permits and coverages. (Fact Sheet, Cooke Declaration Ex. B, p. 3-4).

(Fact Sheet, p. 3, Berger Declaration, Ex. B). Issaquah Highlands is currently about 75 percent (75%) complete. The project has been under development since 1995. (Berger Declaration, ¶4-5).

Discharges of construction stormwater have been authorized during the building process by a series of individual and general NPDES permits issued by Ecology. Port Blakely applied for the current individual NPDES Permit on July 12, 2005. The Permit was issued on October 27, 2005, as a reissuance of the NPDES Permit granted by Ecology in 2000 under the same permit number WA-003188-7. Prior to 2000, the initial phases of Issaquah Highlands were granted coverage under several General NPDES Permits for discharge of construction stormwater. (Berger Declaration, ¶6).

The Issaquah Highlands stormwater system consists of an extensive network of surface and underground piping, temporary erosion and sediment control (TESC) ponds and permanent stormwater ponds for retention and detention (treatment), a separate treatment facility that utilizes sand and chitosan (crushed crab shells) for filtration, a flow splitter located on the Upper Reid Parcel, and various discharge points. Pursuant to the Permit, treated stormwater is directed either to surface water at the North Fork of Issaquah Creek or the East Fork of Issaquah Creek or is infiltrated into the ground. (Fact Sheet, p. 4-6, Berger Declaration, Ex. B).

The original concept for Issaquah Highlands was to infiltrate stormwater at the top of the hill and have it percolate vertically down into the Lower Issaquah Valley (LIV) Aquifer. This proved infeasible when it was discovered that, given the hydrogeology of the area, such an approach led to soil instability on the hillsides. After encountering problems with the original

infiltration concept, the City of Issaquah approved construction of an alternative system on property known as the Lower Reid Parcel to provide infiltration at the base of the hill. Infiltration of stormwater was considered an important aspect of the Issaquah Highlands development to assure adequate recharge of the LIV aquifer. (Johnson Declaration, ¶4).

The infiltration into the ground that is in dispute in this appeal occurs at the Lower Reid Infiltration Gallery (LRIG). The LRIG is located on a 70-foot wide bench at the base of a hill at the western edge of Issaquah Highlands. (Johnson Declaration ¶3). The LRIG essentially consists of two buried pipes, one on top of the other, connected by risers. The piping is approximately 490 feet long with a maximum depth of about 19 feet. Water exits perforations in the top pipe and infiltrates into an extensive bed of cobbles, sands, and gravel. The system includes two manholes visible on the surface of the LRIG property. Water flows into the LRIG from the Reid Pond and flow splitter located on the Upper Reid Parcel. The LRIG receives stormwater from construction activities covered by this permit, as well as stormwater from permanent stormwater facilities within Issaquah Highlands. The discharge into the LRIG is monitored continually for flow and daily for turbidity during the wet season by Port Blakely and its consultants. (Berger Declaration, ¶10).

Port Blakely and King County conducted State Environmental Policy Act (SEPA) environmental analysis for the Highlands in 1995. The SEPA analysis did not originally include any discussion of the LRIG, since it was not part of the original stormwater plan. (Ruple Declaration, Ex. 6, Ex. 10). The Environmental Impact Statement (EIS) was based on the plan to infiltrate stormwater at the top of the Issaquah Highlands plateau, rather than at the base. In

March 2002, Port Blakely submitted an environmental checklist to the City of Issaquah seeking permission to construct the LRIG. The checklist described the LRIG as "an underground stormwater infiltration system." (Ruple Decl, Ex. 2, Attachment 1). The City of Issaquah issued a Mitigated Determination of Nonsignificance (MDNS) for the LRIG in April 2002. The MDNS did not specifically discuss the potential impacts of injecting large quantities of stormwater into the ground in close proximity to the Sammamish Water and Sewer District's drinking water source – the LIV aquifer. (Second Declaration of Ame Wellman, Ex. B). The record before the Board reflects no appeal of the City of Issaquah's MDNS for the LRIG. In or around November 2002 site plans for the LRIG were approved and construction of the system commenced. (Ruple Declaration, Ex. 1, Johnson Declaration ¶4).

Ecology and the City consider stormwater from completed areas of the Issaquah Highlands development to be urban stormwater appropriately managed in permanent stormwater retention/detention ponds. As phases of the development are completed, the stormwater runoff transitions from construction to urban stormwater. Pursuant to a Development Agreement between the developers and the City of Issaquah, the permanent stormwater facilities will be transferred to the City of Issaquah for incorporation as part of the City's municipal stormwater system. Apparently, the process is currently underway for transferring the LRIG from Port Blakely to the City of Issaquah. (Berger Declaration ¶11) (Niven Declaration ¶7).

The Sammamish Plateau Water & Sewer District is a Class A water system operating as a municipal corporation under RCW Title 57. (Little Declaration ¶3). The District's service area includes portions of the cities of Sammamish and Issaquah, and areas of unincorporated King

County. The District is hydraulically divided into two parts: The plateau zone, located south of the Redmond-Fall City Road, and the Cascade View Zone, located north of the Redmond-Fall City Road. The LIV aquifer serves the plateau zone and provides potable water for much of the District's service area. The District, overall, provides potable water to approximately 50,000 people via approximately 15,700 connections. (Little Declaration, ¶4)

The District has expressed particular concern over its wells numbers 7, 8, and 9. These facilities are located in the Issaquah Valley and draw water from the LIV aquifer for delivery to the District's customers. (Little Declaration, ¶7). All three of these wells are down gradient of the LRIG. Wells No. 7 and 8 are within one quarter mile of the LRIG, and Well No. 9 is approximately 600 feet from the LRIG's groundwater discharge point. (Little Declaration, ¶11, 12).

The parties have presented conflicting expert testimony addressing the relationship between the LIV aquifer and the water being infiltrated through the LRIG. James Carr, in support of the District's motion, contends the water infiltrating at the LRIG is in direct hydraulic continuity with the aquifer zones that supply drinking water to the District's wells 7, 8, and 9. (Carr Declaration, ¶30). Mr. Carr suggests the vadose zone is insufficient to improve water quality during high volume discharges and concludes that discharges through the LRIG degrade groundwaters of the State. (Carr Declaration, ¶18-19, 42). Brian Beaman, on behalf of Port Blakely, submits contrary analysis and conclusions. He disputes Mr. Carr's opinion that there is a hydrogeologic connection between the shallow portion of the LIV aquifer below the LRIG and the deeper aquifer from which District Well No. 9 draws its water. (Beaman Declaration, ¶6).

He further disputes Mr. Carr's analysis of the adequacy of the vadose zone. (Beaman Declaration, ¶10).

Information was also presented by both parties relating to the presence of particular substances in the District's well water and in the development's discharges. (Little Declaration) (Carr Declaration)(Lenth Declaration). The District notes high levels of turbidity, elevated levels of manganese and arsenic, as well as newly discovered total coliform contamination in its water. (Little Declaration, ¶18)(Carr Declaration, ¶32-33, 38) Port Blakely contests the District's submission and points to high background levels for manganese and arsenic due to natural sources. (Lenth Declaration, ¶4) As to total coliform, Port Blakely points out that there are a number of septic systems in the area and that such systems typically have higher concentrations of total coliform than stormwater. (Lenth Declaration, ¶5-7).

The permit renewal application for the Construction Stormwater NPDES Waste Discharge Permit consisted of two forms: (1) EPA's Form 1 and, (2) Ecology's Notice of Intent (NOI) Application for General Permit to Discharge Stormwater Associated with Construction Activity. (Johnson Declaration, Ex. A). Bruce Johnson, consulting P.E. and John Lenth, senior environmental scientist with Herrera Environmental Consultants, assisted Port Blakely in preparing the application forms. Mr. Lenth and Mr. Johnson had several conversations about how to respond to certain questions on the application forms. One question they found particularly confusing was EPA Form 1, Part II. F which asked: "Do you or will you inject at this facility industrial or municipal effluent below the lowermost stratum containing, within one quarter mile of the well bore, underground sources of drinking water?" (Johnson Declaration,

Ex. A). Mr. Johnson and Mr. Lenth believed the correct response was "No," because in their opinion, the LRIG would discharge treated stormwater above, not below, the stratum where the District and the City of Issaquah withdraw drinking water. (Johnson Declaration, ¶7)

The Ecology Application for General Permit coverage asked for identification of the receiving water for any discharges. (Johnson Declaration, Ex. A) Port Blakely's answers indicated discharges to both surface water and groundwater. Port Blakely's response to the groundwater question stated the discharge would be to an infiltration gallery, which was further specified by legal description as the Reid infiltration gallery. *Id.*

Port Blakely applied for the currently disputed permit in 2005. At that time, the Washington regulations governing underground injection wells defined an injection well as "a 'well' that is used for the subsurface emplacement of fluids." WAC 173-218-030(11)(2005 Regulations). A well was defined as "a bored, drilled, or driven shaft, or dug hole whose depth is greater than the largest surface dimension." WAC 173-218-030(18)(2005 Regulations). New Class V injection wells injecting industrial, municipal or commercial waste fluids into or above an underground drinking water source were prohibited under the 2005 regulations. WAC 173-218-090 (2005 Regulations).

The Washington Underground Injection Control (UIC) regulations were significantly amended in 2006 and the definition section was modified to include "a subsurface fluid distribution system" within the UIC regulations. (WAC 173-218-030). The 2006 regulations do allow for the possibility of discharges to the ground if certain conditions are met. WAC 173-

218-060(5). Existing wells are allowed a grace period to come into compliance with the 2006 regulations. WAC 173-218-090(2).

The Permit issued to Port Blakely in October 2005 requires preparation and implementation of a Stormwater Pollution Prevention Plan (SWPPP) governing construction activity and construction dewatering. (Permit, Condition S6, Berger Declaration, Ex. A). Condition S6 of the Permit contains three and one half pages of general requirements for the SWPPP and approximately four additional pages identifying the contents and requirements of the plan.

Paragraph 10 of the general SWPPP requirements states: "BMP's shall be selected from Ecology's August 2001 Stormwater Management Manual for Western Washington (SWMMWW) or equivalent." (Permit, p. 14, ¶10, Berger Declaration Ex. A). At the time the Permit was issued to Port Blakely, a 2005 version of the SWMMWW had been adopted and Ecology has stipulated that the permit should have required utilization of the 2005 SWMMWW. (Ecology Response to Sammamish Plateau Water & Sewer District Motion for Summary Judgment, p.5, line 7). The parties dispute whether the *2004 Eastern Washington Stormwater Management Manual* and the *Draft Guidance for UIC Wells that Manage Stormwater* (Ruple Declaration, Ex. 7) should have applied to Port Blakely's permit.

Analysis

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary

judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). All facts and reasonable inferences must be construed in favor of the nonmoving party in a summary judgment.

UIC Regulations

Port Blakely and Ecology have moved the Board for summary judgment on the first legal issue identified in the Pre-Hearing Order which states:

> 1. Does the Lower Reid Infiltration Gallery constitute a Class V injection well within the meaning of WAC 173-218-030(6) and, if so, did issuance of the Permit violate WAC 173-218-090 relating to use of Class V injection wells?

The District's motion seeks a summary judgment directing a remand of the permit based on alleged violations of injection well regulations. The District contends the LRIG was a Class V injection well and that it was prohibited under the applicable regulations. Port Blakely argues

the LRIG was allowable because it was not a well, or an injection well, under the governing definitions.

Port Blakely applied for the permit in dispute in July 2005. At that time the Washington regulations governing underground injection wells defined an injection well as "a 'well' that is used for the subsurface emplacement of fluids." WAC 173-218-030(11)(2005 Regulations). A well was defined as "a bored, drilled, or driven shaft, or dug hole whose depth is greater than the largest surface dimension." WAC 173-218-030(18)(2005 Regulations). New Class V injection wells injecting industrial, municipal, or commercial waste fluids into or above an underground drinking water source were prohibited under the 2005 regulations. WAC 173-218-090 (2005 Regulations).

The Lower Reid Infiltration Gallery is comprised of long lateral pipes buried in trenches no greater than 19 feet deep. The schematics of the installation show that over 400 feet of ground surface was disturbed to create the trenches for the pipes used in the infiltration process. The pipes are not visible from the surface, but manholes are located along the horizontal piping. The issue for resolution is whether the configuration of the LRIG is properly considered a "bored, drilled, or driven shaft, or dug hole whose depth is greater than the largest surface dimension." The Board is convinced the LRIG falls outside the definition of WAC 173-218-030(18) as it existed in 2005. The infiltration gallery is primarily oriented horizontally and its construction did not involve boring, drilling, or driving a shaft. Likewise, the infiltration gallery is not legitimately considered a "dug hole whose depth is greater than the largest surface dimension." The maximum depth of the LRIG is 19 feet, while it extends horizontally for over

400 feet. Considering the manhole covers as the only surface dimension of the installation, as suggested by the District, ignores the totality of the installation and disregards the horizontal orientation of the infiltration gallery.

The Board's conclusion is buttressed by the fact that Ecology adopted revisions to the regulations governing injection wells in 2006 specifically including for the first time, "a subsurface fluid distribution system" within the definition of a UIC. WAC 173-218-030. While the EPA appears to have adopted regulations including infiltration systems under regulations governing injection wells a number of years prior to Ecology, no basis exists for applying the federal definition to the 2005 Port Blakely permit, when Ecology did not adopt such a definition until 2006. When the LRIG was initially evaluated and constructed in 2002, Ecology had not adopted any regulatory guidance that included infiltration systems within the underground injection well concept. The relevant Stormwater Management Manual for Eastern Washington was not adopted until 2004 (Ruple Declaration, Ex. 19) and the Draft Technical Guidance for UIC Wells that Manage Stormwater was originally issued in July 2005; (Adamek Declaration ¶23) both well after construction of the LRIG.

The LRIG simply did not meet the definition of a well contained in Washington's UIC regulations during 2005. Accordingly, any restrictions on Class V wells were inapplicable to the permit application. Port Blakely is granted partial summary judgment on Issue 1 of the Pre-Hearing Order. The LRIG was not properly considered a Class V injection well in 2005.

SEPA

Ecology and the District have filed cross motions for partial summary judgment relating to Issue 9 from the Pre-Hearing Order which states:

> 9. Whether issuance of the Permit is categorically exempt from the requirements in the State Environmental Policy Act, chapter 43.21C RCW?

Ecology claims the Port Blakely permit was categorically exempt from SEPA requirements. The District argues the NPDES permit allowing discharge through the LRIG should have been subjected to SEPA review. The exemption in controversy is found at RCW 43.21C.0383:

> The issuance, reissuance, or modification of a waste discharge permit that contains conditions no less stringent than federal effluent limitations and state rules is not subject to the requirements of RCW 43.21C.030(2)(c).

The District asserts the exemption applies only to state waste discharge permits and not to NPDES permits. Ecology contends the exemption extends to all waste discharge permits, including NPDES permits Ecology issues under federally delegated authority.

The Board has addressed the statutory exemption and its predecessor regulation in prior decisions. In *Marine Environmental Consortium v. Ecology*, PCHB No. 96-257 (First Order on Summary Judgment, May 27, 1997), the Board found the issuance of an NPDES permit exempt from SEPA review. A similar result was reached in *Save Lake Sammamish v. Ecology*, PCHB No. 95-141 (Order Granting Partial Summary Judgment to Respondents) when the Board ruled the general permit for construction stormwater was exempt from SEPA review under a similar

regulation that preceded codification of RCW 43.21C.0383. The District has not presented authority that either requires or justifies differential treatment of state waste discharge permits and NPDES permits issued by the state under the language of the SEPA exemption. The Board concludes the reissuance of NPDES/waste discharge permit WA-003188-7 in this case was exempt from SEPA review pursuant to RCW 43.21C.0383.

The District asserts that an alternatives analysis described in RCW 43.21C.030(2)(e) should have been performed for this permit. The SEPA provision in question directs state agencies to:

> (e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

RCW 43.21C.030(2)(e). The scope of this directive has remained unclear for many years and no appellate authority has given guidance on the meaning of the provision. The Pollution Control Hearings Board has invoked the section only once, in *Marine Environmental Consortium v. Ecology*, PCHB No. 96-257 (First Order on Summary Judgment, May 27, 1997). The Board later ruled that the requirements of RCW 43.21C.030(2)(e) are not applicable if the action in question is categorically exempt. *Yakama Indian Nation v. Ecology et al.*, PCHB Nos. 93-157. (Order on Motions for Summary Judgment, October 9, 1998). The Board has concluded the reissuance of Port Blakely's NPDES permit is categorically exempt from SEPA. Therefore, the provisions of RCW 43.21C.030(2)(e) do not apply to Ecology's consideration and action on the permit.

The District further contends the LRIG was never reviewed fully under SEPA and that the Board should remand this permit for complete environmental review. The LRIG was incorporated into the Issaquah Highlands project after the initial environmental review and EIS had been completed. After instability on the hillside occurred, further design work was undertaken to modify how stormwater was handled on the site. At that time, the LRIG was first incorporated into the design and an environmental checklist was submitted to the City of Issaquah which included the LRIG. The City of Issaquah reviewed the proposal and issued a Mitigated Determination of Nonsignificance (MDNS) in April 2002. The MDNS was not appealed by the District or any other entity. Perceived deficiencies in the MDNS for the LRIG should have been addressed by an appeal of that decision. The renewal of a SEPA-exempt NPDES permit does not reopen the long-concluded environmental review process covering creation of the LRIG. Ecology is granted summary judgment on Legal Issue No. 9 of the pre-hearing order and related SEPA arguments raised by the appellant's briefs.

SWPPP Adequacy

Two legal issues were identified in the Pre-Hearing Order involving the Stormwater Pollution Prevention Plan requirements of the Permit.

> 7. Is Ecology required to include specific requirements for developing a SWPPP in the Permit? If so, does the Permit include specific requirements for developing a stormwater pollution prevention plan that will ensure compliance with Permit effluent limitations and applicable water quality standards including the implementation of all known, available, and reasonable control technology?
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> 8. Does the Permit have to provide for public access to the SWPPP required under the Permit including without limitation, monitoring plans

inspection reports and water quality sampling? If so, does the public have adequate access to such information under the Permit?

The Port Blakely permit contains a significant number of requirements governing the development and content of the mandatory SWPPP. Condition S6 of the Permit contains three and one-half pages of general requirements for the SWPPP and approximately four additional pages identifying the contents and requirements of the plan. (Permit, Condition S6, Berger Declaration, Ex. A). The Permit provides sufficient direction to Port Blakely on how to prepare the SWPPP, and on what items must be included in the SWPPP. However, the record is insufficient at this point in the proceedings, to rule whether the SWPPP requirements will be adequate to achieve protection of water quality. The sufficiency of the SWPPP requirements to ensure compliance with Permit effluent limitations, and applicable water quality standards, including AKART will be set over for hearing. (See Legal Issue No. 7, Part 2).

The District also questions the sufficiency of public access to the SWPPP and requirements for monitoring plans, inspection reports, and water quality sampling. Port Blakely is required to submit the SWPPP to Ecology annually, with the first submittal on March 1, 2006. (Permit, pg. 5, Berger Declaration, Ex. A). This date has already passed and, presumably, the SWPPP is on file with Ecology. The Board would note, however, that a permit for a project of this size and the subject of so much local concern should require filing of the SWPPP with Ecology prior to initiating discharges under the permit. Public access to the SWPPP and other required reports is achieved through the Department of Ecology rather than directly from the facility. Therefore, it is important for the agency to have a timely copy of the required SWPPP

to assure adequate public access to the permit information and anticipated stormwater management practices. Under the Port Blakely permit, monitoring reports are submitted to Ecology monthly (Condition S4) and inspection reports are included as part of the SWPPP. (Permit, p. 19). These documents are public records and can be fully accessed by the public through the Department of Ecology's public record process. The facts before the Board do not demonstrate a deficient or unworkable process for public access to important information relevant to the permit and its implementation. Accordingly, summary judgment is granted to Ecology dismissing the first portion of Legal Issue No. 7 and all of Legal Issue No. 8 of the Pre-Hearing Order.

Scope of Permit Coverage

The District asks the Board to remand the permit to Ecology because it regulates only a portion of the stormwater discharged from the Issaquah Highlands site. The District argues the permit must address all the stormwater discharges from the area, not a discrete portion, such as the 180 acres currently under construction. The responding parties challenge the Board's jurisdiction to require a permit for activity that is not part of the permit application. Port Blakely applied for NPDES/waste discharge coverage for 180 acres of construction stormwater discharge. The entire development is larger than the acreage subject to this permit. The record before the Board indicates other portions of the development are being regulated separately, and that much of the stormwater is considered permanent discharge, rather than construction discharge. The permanent discharges are being incorporated into the City of Issaquah's stormwater system and regulated accordingly.

The appeal before this Board challenges the permit approval granted for Permit No. WA-0003188-7. The Board is authorized by statute to rule on Ecology's decision granting permit approval. RCW 43.21B.110(c). Challenges to the regulatory agency's failure to require permit coverage for certain other stormwater discharges, however, are not identified as part of the Board's statutory review authority and must be pursued in an alternate forum. The Board, therefore, denies the District's request to remand the permit to Ecology for consideration of all stormwater discharges from the Issaquah Highlands development.

Misrepresentation

The District alleges the permit should be terminated because Port Blakely misrepresented the LRIG's potential for adverse effects when completing the permit applications. The District does not believe Ecology had sufficient information about the LRIG's proximity to and potential impact on the LIV aquifer to adequately analyze the permit decision. Particular focus has been placed on EPA Form 1, Part II. F, which asked: "Do you or will you inject at this facility industrial or municipal effluent below the lowermost stratum containing, within one quarter mile of the well bore, underground sources of drinking water?" Port Blakely answered this question "No," because in its opinion, the LRIG would discharge treated stormwater above, not below, the stratum where the District and the City of Issaquah withdraw drinking water. (Johnson Declaration, ¶7). The question on Form 1 is worded awkwardly. The specific intent of the inquiry is unclear, although it is apparent that some relationship between drinking water and the injected material is being explored. In light of this ambiguity, Port Blakely's explanation of its answer is reasonable as well.

Ecology indicates it was aware of the intent to infiltrate stormwater into the ground at the LRIG when it reviewed the application. This is substantiated by the inclusion of language in the permit identifying the receiving water as the "Reid infiltration gallery (to ground water)." (Permit, pg. 2). Ecology contends it evaluated the impacts of the proposed discharges on groundwater and considered the groundwater a drinking water source. The terms of the permit are designed to protect the viability of the LIV as a public water supply. Whatever confusion may have occurred in relation to items contained in the application forms, the information provided to Ecology was adequate for Ecology to evaluate the impacts of the proposal and to establish conditions protective of the aquifer. A remand based on deficiencies or misrepresentation in the permit application is not warranted under the facts of this case.

Substantive Permit Standards

Ecology has moved for summary judgment dismissing the District's claims that: (1) the permit's effluent limits allow discharges that will cause or add to a violation of water quality standards, (2) monitoring requirements under the permit are insufficient, and (3) the permit fails to assure compliance with federal and state law, including all known, available, and reasonable methods of prevention, control, and treatment (AKART). The record before the Board shows disputed issues of material fact relating to the adequacy of the permit standards.[3] Expert testimony submitted in connection with the motions reaches different conclusions about the

[3] The record reflects Ecology referenced the wrong version of the SWMMWW in this Permit. Steps have been taken to correct this error. The attempted correction is being litigated in a related case pending before the Board. Under the circumstances, the Board does not find summary judgment on this issue appropriate.

potential impacts of the allowed discharges. Summary judgment on these issues is denied, and the following issues from the Pre-Hearing Order are set over for hearing:

2. Did Ecology consider all applicable water quality standards including, without limitation, wellhead protection standards, anti-degradation standards for ground water, ground water quality standards, Chapter 173-200 WAC, and federal drinking water standards?

3. Will discharges authorized by the Permit adversely impact the wellhead protection areas for District Wells No. 7, 8, and 9 in violation of WAC 246-290-135?

4. Will discharges authorized by the Permit cause or contribute to a violation of the anti-degradation standard for ground waters of the state under WAC 173-200-030?

5. Does the Permit include effluent limitations that will ensure that the authorized discharges do not cause or contribute to a violation of water quality standards or injury to existing beneficial uses?

6. Does the Permit require monitoring sufficient to determine compliance with permit effluent limitations and applicable water quality standards?

7. Does the Permit include specific requirements for developing a stormwater pollution prevention plan that will ensure compliance with permit effluent limitations and applicable water quality standards including the implementation of all known, available and reasonable control technology?

The parties have agreed that any concern regarding compliance with surface water standards falls outside the issues stated in this case.

Based upon the foregoing analysis the Board enters the following:

ORDER

1. Port Blakely is granted summary judgment that the Lower Reid Infiltration Gallery does not constitute a Class V injection well within the meaning of WAC 173-218-030(6). Legal Issue No. 1 from the Pre-Hearing Order is dismissed.

2. Ecology is granted summary judgment that the issuance of Permit WA 003118-7 is categorically exempt from the requirements of the State Environmental Policy Act, chapter 43.21C RCW and that no additional SEPA requirements apply to the permit's issuance. Legal Issue No. 9 from the Pre-Hearing Order is dismissed.

3. Ecology is granted summary judgment that the Permit contains sufficient guidance on preparation of the Stormwater Pollution Prevention Plan and that the provisions for public access to the SWPPP and other relevant project data are adequate. The first portion of Legal Issue No. 7 and all of Issue No. 8 from the Pre-Hearing Order are dismissed.

4. The District's requests to remand the permit based on insufficient or misleading information in the permit application and improper scope of the permit are denied.

5. Ecology's motions for summary judgment on adequacy of the substantive provisions of the permit relating to water quality, anti-degradation, drinking water standards, AKART, and monitoring are denied, and Legal Issues 2-6 and the

second portion of Legal Issue 7 of the Pre-Hearing Order are set over for hearing.

Dated this 2nd of October 2006.

POLLUTION CONTROL HEARINGS BOARD

WILLIAM H. LYNCH, CHAIR

KATHLEEN MIX, MEMBER

ANDREA MCNAMARA DOYLE, MEMBER

Phyllis K. Macleod
Administrative Appeals Judge